

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

SMOKE HOUSE RESTAURANT, INC.

Respondent

and

**Cases 31-CA-26240
31-CA-26418
31-CA-26285**

**HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES UNION, LOCAL 11 AFL-CIO**

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel submits this Answering Brief in Opposition to Respondent's Exceptions to Administrative Law Judge John J. McCarrick's Decision in the captioned matter.¹

I. PROCEDURAL HISTORY

This compliance proceeding was tried before the Honorable John J. McCarrick on September 25-26, 2013, in Los Angeles, California based on a Compliance Specification issued by the Regional Director for Region 31 on March 31, 2010, and amended on June 29, 2012 (hereinafter "Specification"). The *Specification* sets forth the backpay and back contributions that Respondent Smoke House Restaurant Inc. (hereinafter "Respondent") owed to the Los Angeles Hotel-Restaurant Employer-Union Welfare Fund ("Trust Fund") and employees.

On February 26, 2013, ALJ McCarrick issued his Decision finding that the Respondent must discharge its make-whole obligations for the periods alleged in the Specification, May 1, 2003 through August 2012, for the premium and medical expenses, together with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 137 (D.C. Cir. 2011). (ALJD at 15). Specifically, ALJ McCarrick found that Respondent owes employees premium expenses in the amount of \$213,610.74, medical expenses in the amount of \$9,590.59 and Trust Fund contributions in the amount of \$1,250,118.36. *Id.*

¹ Citations are as follows: Administrative Law Judge Decision (ALJD at __); Respondent's Brief in

II. INTRODUCTION

Respondent has repackaged, in the form of twenty-four separate Exceptions, the same substantive and procedural arguments it presented to the ALJ, and which the ALJ duly rejected based on the record in the compliance hearing and post-hearing briefs submitted by the parties. As the following discussion will demonstrate, ALJ McCarrick's decision rests on solid credibility determinations, the overwhelming weight of the evidence, and well-established Board precedent and federal case law.

Counsel for the Acting General Counsel has organized its Answering Brief into ten categories grouping related Exceptions together for discussion.

A. Organization of Response

Respondent organized its Exceptions into twenty four separate Exceptions (labeled 1-24) corresponding to various issues that were litigated before ALJ McCarrick. At the beginning of its brief in support of the Exceptions, Respondent explained that it would address issues in six categories (labeled 1-6). (REB 2-3). In fact, Respondent's argument is broken into seven separate categories (labeled 1-7). To further complicate matters, Respondent nowhere identifies or discusses specific Exceptions within its argument, making it difficult to specifically address the majority of the Exceptions in this Answering Brief.

The Board's Rules and Regulations call for precise Exceptions specifying articulated grounds and relying on identified record evidence and relevant law. In contravention of these rules, it is nearly impossible to ascertain from Respondent's brief where it addresses any of its specific Exceptions. Rather than clarifying the issues for review, Respondent's Exceptions fail to

Support of Exceptions (REB at __); Transcript (Tr. __); Exhibits (GC Ex __; or R Ex __).

comply with the Boards Rule's and Regulations which require that briefs in support of Exceptions contain the following:

- (1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.
- (2) A specification of the questions involved and to be argued, together with a reference to the specific Exceptions to which they relate.
- (3) The argument presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

B. Respondent Misstates the Procedural History of the Case

Respondent states that the instant compliance hearing was held pursuant to the May 1, 2009, order of the United States Court of Appeals Ninth Circuit (unpublished) decision *National Labor Relations Board v. JLL Restaurant, Inc. et al.*, Case No. 07-74755, NLRB Nos 31-CA-26240, 31-CA-26418, 31-CA-26285. (REB 1.) However, the Acting General Counsel initiated compliance proceedings based on Respondent's failure to comply with the Board's Order set forth in the Board's May 2006 decision.

On May 31, 2006, the National Labor Relations Board issued its decision and order in *JLL Restaurant, Inc. d/b/a Smoke House Restaurant*, 347 NLRB 192 (2006), finding, inter alia, that Respondent Smoke House Restaurant, Inc. violated Section 8(a)(5) and (1) of the Act by failing to apply the terms of the collective bargaining agreement between its predecessor, JLL, and the Union, and unilaterally changing certain contractual provisions as well as and terms and conditions of employment. (G.C. Exh. 1(a).) Consequently, the Board ordered the Respondent to make whole employees for all losses that they incurred due to the Respondent's failure to adhere

to the terms of the collective bargaining agreement. Specifically, at issue in the compliance hearing was the Respondent's unilateral change in its failure to make contractually required contributions to the Los Angeles Hotel Restaurant Employer Union Trust Fund Plan ("Trust Fund") as provided by the collective bargaining agreement. (G.C. Exh. 1(a).) Instead, the Respondent implemented various health care plans outside the collective bargaining agreement, which required employees to make out of pocket premium payments.

C. Respondent's Bare Exceptions, 21 and 22, Should Be Disregarded

As a threshold matter, some of Respondent's Exceptions fail to comply with the requirements of Section 102.46(b) of the Board's Rules and Regulations by failing to state, either in its Exceptions or its brief, on what grounds the purportedly erroneous findings or conclusions should be overturned.² *Sunshine Piping, Inc.*, 351 NLRB 1371, n.1 (2007) (Board disregarded "bare Exceptions" that were unsupported by argument); *New Concept Solutions, LLC*, 349 NLRB 1136, n.2 (2007) (Board disregarded bare unsupported Exceptions to judge's findings of violations).

While Respondent's failure to specifically identify what parts of its argument apply to specific Exceptions makes it difficult to ascertain at times whether the substance of particular allegations are addressed, Respondent's brief is clearly silent with respect to the Exceptions characterized herein as "bare Exceptions." For these "bare Exceptions" Respondent does not explain how the ALJ erred or the grounds on which his findings or conclusions should be overturned. These Exceptions, devoid of evidentiary support or legal argument, should be disregarded and denied in their entirety.

III. DISCUSSION

A. Exceptions to the ALJ's Decision Not to Apply Ninth Circuit as Binding Precedent (Exception 1)

In Exception 1, Respondent takes issue with the ALJ's decision not to be bound by the unpublished Memorandum Decision of the Ninth Circuit Court of Appeals in the enforcement action in Smoke House Restaurant and align "make whole" orders with Ninth Circuit law. (REB 3-4.)

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN BRIEF
1- To the ALJ decision to not apply Ninth Circuit Law "make whole" orders to his Findings in the Compliance Hearing.	2-3

The ALJ found that, "Notwithstanding the footnote by the Ninth Circuit panel noting that its Memorandum Decision is of no precedential value, the Court was without jurisdiction in the enforcement proceeding to consider issues of remedy." (ALJD at 6). As cited by the ALJ, in his decision, an administrative law judge is required to follow established Board precedent which neither the Board nor the Supreme Court has reversed notwithstanding contrary decisions by courts of appeals. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enfd.* F.2d 1017 (9th Cir. 1981).

² Bare Exceptions are identified throughout this brief.

Respondent contends that the ALJ erred in its decision to not apply Ninth Circuit Law “make whole” orders to his Findings in the Compliance Hearing. Respondent’s argument supporting its position that the Ninth Circuit’s Memorandum Decision is binding on the ALJ is simply incorrect. Respondent argues that cases including in *San-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), *Planned Building Services, Inc.* 347 NLRB 670(2006), *Advanced Stretchforming Inc.*, 323 NLRB 529,530 (1997) enfd. in 233 F.3d 1176 (9th Cir. 2000), *Kallman v. NLRB* 640 F.2d 1094 (9th Cir. 1981), and others are either United States Supreme Court, Ninth Circuit or Board cases that have followed Ninth Circuit law, or in the case of the Ninth Circuit decisions followed Supreme Court law. (REB 2-3.) However, as articulated by ALJ McCarick in his decision, Respondent fails to understand that an administrative law judge is required to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by a Court of Appeals. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981)(ALJD at 7). Therefore, the ALJ is not obligated to fashion Respondent’s financial liability under the “make whole” order, and to align “make whole” orders with the Ninth Circuit memorandum.

In *Kraft Plumbing & Heating, Inc.*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), the Board outlined the remedy for a Respondent’s unilateral discontinuance of monthly contributions to health and welfare, pension, industry and apprenticeship funds provided for in the collective bargaining agreement. The Board ordered respondent:

“to make whole the employees in the appropriate unit by transmitting the contributions owed to the Union’s health and welfare, pension, industry and apprenticeship funds pursuant to the terms of its collective-bargaining agreement with the Union, and by

reimbursing unit employees for any medical, dental or any other expenses ensuing from Respondent's unlawful failure to make such required contributions."

Thus the remedy set forth by the Board in *Kraft Plumbing & Heating, Inc.*, is the appropriate remedy. Accordingly, Respondent's Exception 1 should be denied in its entirety.

B. Exceptions to the ALJ's Decision Not to Allow Respondent to Relitigate Matters Decided in the Underlying Unfair Labor Practice Proceeding (Exceptions 2 and 3)

RESPONDENT'S EXCEPTIONS *	WHERE DISCUSSED IN BRIEF
2- To the ALJ decision to not comply with the Ninth Circuit court decision/order allowing Respondent under prior Bd. Law to present evidence of impasse between Smoke House predecessor JLL and the Union. 3- To the ALJ decision to not comply with the Ninth Circuit Order to allow Respondent to present evidence that the collective bargaining agreement had already been changed by Smoke House predecessor JLL.	2-3

The ALJ determined that, notwithstanding his finding that the Ninth Circuit's Memorandum Decision, insofar as it addressed compliance issues, is dicta and therefore not binding, issues litigated and decided in an unfair labor practice proceeding, and therefore may not be re-litigated in the ensuing backpay proceeding. (ALJD at 9; *Paolicelli*, 335 NLRB 881, 883 (2001).)

In Respondent's Exception 2, Respondent contends that that the ALJ erred in preventing Respondent from presenting evidence of a purported impasse between Smoke House's predecessor and the Union ostensibly during their 2003 negotiations. In Respondent's Exception

3, Respondent contends that the ALJ erred in preventing Respondent from presenting evidence that the collective bargaining agreement had already been changed by Smoke House's predecessor.

However, Respondent's brief is devoid of any argument in support of the Exceptions enumerated above. Insofar as the Respondent argues that the ALJ was bound to hear arguments based on the Ninth Circuit's Memorandum Decision, this is incorrect as the ALJ is not bound by the Ninth Circuit. Again an administrative law judge is required to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by a Court of Appeals. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981)(ALJD at 11).

With respect to Respondent's Exceptions 2 and 3, these issues have been litigated and decided in an unfair labor practice proceeding, and therefore, may not be relitigated in the ensuing backpay proceeding. *Paolicelli*, 335 NLRB 881, 883 (2001). In *JLL Restaurant, Inc. d/b/a Smoke House Restaurant*, 347 NLRB 192 (2006), the Board found that the Respondent unlawfully failed to apply the terms of the collective bargaining agreement between JLL and the Union and unilaterally changed terms and conditions of employment.

Therefore, because the Board determined that a unilateral change occurred, prior to impasse, Respondent's assertion that JLL changed the collective bargaining provisions regarding healthcare prior to May 1, 2003 is immaterial as the issue has already been litigated and decided. Similarly, Respondent also had the opportunity in the underlying ULP hearing to litigate whether the collective bargaining agreement had already been changed by JLL.

Thus, Respondent's Exceptions 2 and 3 should be denied.

C. Exceptions to the ALJ's Finding That Respondent and the Union Were at Impasse
(Exceptions 4, 7, 8, 9)

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN BRIEF
<p>4- To the ALJ decision to not comply with the Ninth Circuit Court and prior Board law to allow Respondent to present evidence of impasse between Smoke House and the Union.</p> <p>7- The ALJ disregarded evidence of impediments to collective bargaining by the union, which led to an impasse between Respondent and the Union as early as 2003.</p> <p>8- The ALJ disregarded evidence of impediments to collective bargaining by the GC office which led to an impasse between Respondent and the Union as early as 2003.</p> <p>9- The ALJ disregarded evidence of impediments to collective bargaining by HERE Health which led to an impasse between the Respondent and the Union, as early as 2003.</p>	<p>10-16</p>

Again, ALJ McCarrick concisely set forth the facts and his legal analysis with respect to Respondent's contention that it would not have agreed to the economic terms of the previous collective-bargaining agreement and that it reached impasse with the Union. (ALJD at 9-11). ALJ McCarrick found that there can be no impasse where there are unremedied unfair labor practices. Additionally, ALJ McCarick found that Respondent had presented insufficient

evidence to meet its burden to demonstrate that it would not have agreed to the monetary provisions of the predecessor employer's collective bargaining agreement. (ALJD at 9-10). In his decision the ALJ noted that Board does not lightly infer the existence of an impasse, and the burden of proving it rests on the party asserting that an impasse exists. *Naperville Ready Mix, Inc.*, 329 NLRB 174, 183 (1999), enfd. 242 F.3d 744 (7th Cir. 2001); *Serramonte Oldsmobile*, 318 NLRB 80, 97 (1995), enfd. in rel. part 86 F.3d 227 (D.C. Cir. 1996).

The ALJ also found that the neither the Union nor the General Counsel impeded negotiations. (ALJD at 11).

In Respondent's fourth exception it contends that the ALJ erred in not allowing Respondent to present evidence of impasse between the Employer and the Union. In Respondent's seventh exception, it contends that the ALJ disregarded evidence of impediments to collective bargaining by the Union which led to an impasse between Respondent and the Union as early as 2003. In Respondent's eighth exception, it contends that the ALJ disregarded evidence of impediments to collective bargaining by the General Counsel's office which led to an impasse between Respondent and the Union as early as 2003. In Respondent's ninth exception it contends that the ALJ disregarded evidence of impediments to collective bargaining by HERE Health, which led to an impasse between Respondent and the Union, as early as 2003.

ALJ McCarrick used the appropriate standard as set forth in *Planned Building Services* 347 NLRB 670, 670 (2006), where the Board reviewed the appropriate make-whole remedy when a successor employer discriminatorily denied employment to its predecessor's employees and violated its duty to bargain by unilaterally setting initial terms and conditions of employment. (ALJD at 9). In *Planned Building Services, Inc.* 347 NLRB 670, 670 (2006), the Board considered the issue of what was the appropriate make-whole remedy was when a successor

employer discriminatorily denied employment to its predecessor's employees and violated its duty to bargain by unilaterally setting initial terms and conditions of employment. The remedy that the Board has traditionally has imposed for such unlawful conduct seeks to make employees whole for the successor's violation of the law by ordering the restoration of the predecessor's terms and conditions of employment until the successor either reaches a new agreement with the union or bargains to impasse. *Id. at 675.*

However, in *Planned Building Services, Inc.* the Board held that it would allow a successor employer to present evidence, in a compliance proceeding, that it would not have agreed to the monetary provisions of the predecessor employer's collective bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. *Id. at 676.* If the respondent carries its burden of proof on these points the measure of the respondent's make-whole obligation may be adjusted accordingly. *Id.*

Here, Respondent presented insufficient evidence to meet such a burden. The Respondent presented no probative evidence that the parties bargained until impasse, or would have bargained to impasse over the issue of health and welfare benefits. To the contrary, Respondent presented no evidence of any meaningful collective bargaining negotiations.

First, Respondent failed to demonstrate that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement. Respondent presented evidence that in 2003 Respondent's Chief Financial Officer Leland Spencer ("Spencer") told Union representatives that they could not take on the obligation of starting the insurance plan until they knew what their financial status was. (Tr. 259:13- 15.) Mr. Spencer added that he did

not feel comfortable signing a long term contract with the Union, even a two-year contract, because the business was on “quicksand.” (Tr. 259:20- 22.) However, Respondent failed to produce any probative documentary evidence in support of its purported inability to pay. Additionally, Respondent presented insufficient evidence of any meaningful bargaining after May 1, 2003 which would have potentially provided an indication of what the Respondent would have agreed to. Similarly, Respondent introduced no evidence to support a finding of a date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated.

Furthermore, Respondent presented insufficient evidence to establish the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. Similarly, Respondent presented no evidence to substantiate its affirmative defense that the Respondent and Union initially reached an impasse in negotiations on employees’ healthcare benefits prior to the Board’s order and Respondent was free to enact its last best offer.

Additionally, in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir.1968), the Board enumerated some of the factors it takes into account in determining whether the parties have reached impasse:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is a disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors in deciding whether an impasse in bargaining existed.

The Board does not lightly find an impasse and the burden is on the party asserting it. *CJC Holdings, Inc.*, 320 NLRB 1041, 1044 (1996) citing *Powell Electrical Mfg. Co.*, 287 NLRB 969, 973 (1987). Additionally, the Board has held that a lawful impasse cannot be reached on this

issue in the presence of unremedied unfair labor practices. *Titan Tire Corp.*, 333 NLRB 1156, 1159 (2001).

Here, Respondent has failed and refused for over six years to comply with the Board's Order that it remedy its unfair labor practices, including restoring the terms and conditions of employment established in its predecessor's collective bargaining agreement with the Union. In addition, Respondent has refused to reimburse the Trust Fund for over nine years of contributions but has attempted to condition further bargaining upon the Union compromising the amount of contributions ordered by the Board. Respondent's refusal to remedy the unfair labor practices found by the Board, specifically restoring the terms and conditions of employment contained in its predecessor's collective bargaining agreement is part of good faith bargaining and precludes a finding that Respondent and the Union could have ever reached good faith impasse.

Likewise, with respect to exceptions 7, 8 and 9, the Respondent failed to present probative evidence that the ALJ disregarded evidence that the General Counsel, the Union or the Trust fund impeded collective bargaining negotiations. Respondent contends that the Trust Fund, Union, and General Counsel maintained that the Respondent must pay a rate over the contractual rate of \$1.43 to be reinstated into the Trust Fund which would make Respondent in compliance with the Board's order. (REB 15). Respondent cites an attempt to reinstate coverage by sending the Trust Fund a check in the amount for \$98,754.31 to restore employee healthcare plan. *Id.* However, Mr. Spencer admitted that the Trust Fund never cashed any checks the Respondent tendered in an attempt for restoration. (Tr. 298:4- 9.) Additionally, coverage was never restored to the employees, and employees could not individually apply for benefits under Trust Fund rules and regulations. (Tr. 298:22- 299:2.) Therefore, Respondent did not reinstate terms and

conditions of employment as mandated by the Boards' Decision and Order in *JLL Restaurant, Inc. d/b/a Smoke House Restaurant*, 347 NLRB 192 (2006),

The ALJ correctly determined that Respondent's argument that the General Counsel and Union impeded negotiations was wholly lacking in merit. (ALJD at 11.) The ALJ noted that alleged misconduct by a charging party is not a defense to an unfair labor practice proceeding. *Greyhound Lines*, 319 NLRB 554, 555-557 (1995). Similarly, the ALJ found that there was no evidence of misconduct on the part of the General Counsel, only an insistence that Respondent fully remedy unfair labor practices found by both the Board and the Court. (ALJD at 11).

Accordingly, Respondent's Exceptions 4, 7, 8, and 9, should be denied.

D. Exceptions to the ALJ's Finding That Employees Had a Future Stake in the Viability of the Trust Fund Plan (Exceptions 5-6, 14)

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN BRIEF
5- To the ALJ decision that the union, nor GC, had to present evidence of employees' future stake in the viability of the healthcare plan. 6- To the ALJ finding that Respondent is liable for Backpay premiums to the Employee healthcare only Fund without evidence that the employees have a true interest in their future viability. 14- No evidence of benefit/loss by HERE Health.	4-7

ALJ McCarrick concisely set forth the facts and legal analysis with respect to the fact that employees have a future stake in the viability of the Trust Fund plan. (ALJD at 7-8). He found that Respondent's own payroll records together with the terms and conditions of employment in its predecessor's collective bargaining agreement with the Union and the trust health plan summary established that Respondent's employees were entitled to health care coverage under the Trust. (ALJD at 7). ALJ McCarrick cited *Sedgwick Realty LLC and R & S Management A/K/A Arandess Mgt. Co.*, 337 NLRB 245, 247 (2001), for the proposition that where employees hold a nonspeculative interest in a pension or health fund, ordering Respondent to reimburse that fund is remedial because such contributions "insure the fund's financial viability necessary to satisfy employees' future needs." (ALJD at 7). ALJ McCarrick also noted that Respondent's bargaining unit employees were still represented by the Union and had not disclaimed interest in the Trust Fund. (ALJD at 8). Additionally, the Board does not require employees to be certain to benefit from a trust fund before ordering contributions to that fund on their behalf. *Kenmore Contracting Co.*, 303 NLRB 1, 2 (1991). In *Kenmore Contracting Co.*, the Board added that, "the Board's established premise that such employees may have a future interest in the funds is sufficient linkage to warrant that the trust fund contributions be paid." *Id.*

Here, in Respondent's Exception 5, it contends that the ALJ erred in deciding that the Union and the General Counsel had to present evidence of employees' future stake in the viability of the healthcare plan. In Respondent's Exception 6, it contends that the ALJ erred in finding that Respondent is liable for backpay premiums to the Trust Fund without evidence that employees have an interest in the future viability of the Trust Fund.

As articulated by the ALJ, employees have a future stake in the viability of the Trust Fund. In the instant case, because Respondent unilaterally discontinued payments to the Trust Fund, they are obligated to make the Trust Fund whole. Respondent's bargaining unit employees have a nonspeculative future interest in the financial viability of the fund as they will benefit from the Trust Fund's resources commencing at the time they are reinstated. Additionally, the retroactive contributions will contribute to the financial health of the Trust Fund. Respondent is legally bound to make payments to the Trust Fund from the time of the unilateral change until through the end of August 2012, as outlined in G.C. Exhibit 11, with liability continuing to accrue. Furthermore, Respondent's contention that the Trust Fund did not show a benefit or loss is irrelevant to their responsibility to make the Trust Fund whole for payments they chose not to make.

Thus, Respondent's Exceptions 5, 6 and 14, should be denied.

E. Exceptions to the ALJ's Finding that Respondent Was Liable to "Make Whole" the Trust Fund Beyond the Expiration Date of the Collective Bargaining Agreement (Exceptions 10 and 11)

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN BRIEF
<p>10- The ALJ findings enforcing a "make whole" remedy beyond the termination date of the CBA is not support by Ninth Circuit or Board law.</p> <p>11- The ALJ findings enforcing a "make whole" remedy far beyond the termination date of the CBA is punitive.</p>	16-17

Legal precedent supports the ALJ's conclusion that that Respondent should discharge its make-whole obligations for the periods alleged in the compliance specification, May 1, 2003 through August 2012, for the Trust Fund payments, and December 1, 2003 through August 2012, for the premium and medical expenses together with interest, compounded daily. (ALJD at 15).

In Respondent's Exception 10, it contends that the ALJ's recommended order enforcing a "make whole" remedy beyond the termination date of the collective bargaining agreement is not supported by either Ninth Circuit or Board law. In Respondent's Exception 11, it contends that the ALJ order enforcing a "make whole" remedy far beyond the termination date of the CBA is punitive.

To support its Exceptions, Respondent contends that any "make whole" remedy, which subjects an employer to continuing liability beyond the termination of the collective bargaining agreement is punitive and unenforceable. However, the Board has determined that in instances where a respondent has unlawfully unilaterally discontinued payments to benefit trust funds, Respondent must make whole the trust funds on behalf of employees possessing a nonspeculative future economic interest in those funds. *Stone Boat Yard*, 264 NLRB 981, 983 (1983), *enfd.* 715 F.2d 441 (9th Cir. 1983), *cert. denied* 466 U.S. 937 (1984). Similarly, in *Triple A Fire Protection, Inc.*, 357 NLRB No. 68, slip op. at 3 (2011), the Board stated that when a respondent unlawfully ceases making required payments to benefit funds on behalf of employees, the appropriate remedy is to require that the fund be made whole for the missed payments.

Respondent also argues that the General Counsel advocated what the Ninth Circuit said that it could not do, which is to enforce a "make whole" remedy far beyond the termination date of the predecessor and the Union's contract. (REB 16-17). However, once again Respondent cannot advocate that Ninth Circuit memorandum and cases are binding on the ALJ.

Accordingly, these Exceptions should be denied.

F. Exceptions to the ALJ's Finding That Board Agent Pierce Was Reasonable in Selecting the Healthcare Plans That Each of the Employees Belonged to and the Individual Payments That Employees Made Under This Plan (Exception 13)

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN BRIEF
13- The compliance officer's admission that she did not inquire of any employees, which of the four plans each employee belongs to, which vary in deductions.	20

The ALJ determined that the General Counsel does not have to show that if Respondent's employees were still covered by one of the Trust Fund health plans they would have had more or less out-of-pocket expenses. (ALJD at 12).

In Respondent's exception 13, Respondent contends that the ALJ did not consider Board agent Pierce's admission that she did not ask any employees which of the four plans each employee was covered under. Respondent argues that the data and information used to calculate individual unit employees' actual expenditures was flawed, and amounted to guessing which plan each unit employee would have belonged to. (REB 20).

Here, Board agent Pierce made a determination to use the Kaiser Plan B as the baseline plan. (Tr. 157:15- 16.) Pierce made this selection because it offered the highest level of coverage to the employees. (Tr. 158:6- 13.) In a compliance proceeding, the General Counsel's burden is to demonstrate the gross amount of backpay due which is the amount an employee would have received but for the employer's illegal conduct. The General Counsel, in demonstrating gross amounts owed, need not show an exact amount, an approximate amount is sufficient. *Laborers*

Local 158 (Worthy Bros.), 301 NLRB 35, 36 (1991). Because it is often impossible to calculate the exact amount of backpay owed to each employee, General Counsel's burden of proof is met by employing a formula designed to produce a reasonable approximation of what is owed. *Reliable Electric Company*, 330 NLRB 714, 723 (2000)(citing *Intermountain Rural Electric Assn.*, 317 NLRB 588, 591 (1995)) (emphasis added). Therefore, Board agent Pierce was not obligated to use the particular plan used by each employees, and the ALJ properly found that Board agent Pierce was reasonable in selecting the Kaiser Plan B as the baseline plan.

Accordingly, Respondent's Exception 13 should be denied.

G. Exceptions to the ALJ's Findings that Lynne Pearson Was Entitled to Backpay in the Amount of \$9590.59 for Her and Her Daughter's Medical Expenses as Well as the ALJ's Finding That Her Daughter was Disabled (Exceptions 15 and 16)

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN BRIEF
<p>15- There is no evidence in the record to support a finding of Pearson's daughter's disability.</p> <p>16- There is no legal basis for ALJ's finding that Pearson's daughter was disabled.</p> <p>17- There is no evidence of payment of Pearson's daughter medical care, or for prescription drugs for her daughter.</p> <p>18- The ALJ erred in admitting the prescription drug summaries of Pearson and her daughter.</p> <p>19- The ALJ erred in disregarding evidence of payment by Pearson's Workers Comp. settlement for medical care during the relevant</p>	<p>20-25</p>

<p>period not covered by Respondent.</p> <p>20- The ALJ erred in omitting evidence of payment by Pearson and her daughter's Mold case settlement for medical care during the relevant period not covered by Respondent.</p>	
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ALJ McCarrick concisely sets forth the facts that led him to conclude that former employee Lynne Pearson ("Pearson") was owed \$9590.59 in backpay for medical expenses she incurred during the liability period. (ALJD 4-7). In making this determination, the ALJ cited the fact that there was no evidence of any award in any Worker's Compensation claim for prescription drugs nor was there any evidence of a settlement of a private mold lawsuit providing for prescription drug payments to Pearson or members of her family. (ALJD at 12). The ALJ also concluded, contrary to Respondent's contention, that Pearson did provide evidence of her out-of-pocket medical expenses. *Id.*

With respect to Pearson's daughter the ALJ noted that typically a dependent child would no longer be eligible for coverage over the age of 19 under the Trust Fund plan. (ALJD at 4.) However, the ALJ determined that Board agent Pierce reasonably made her calculations assuming that Pearson's daughter was disabled In view of her impairments and the Social Security Administration's finding of disability in 2006. *Id.*

Respondent sets forth an array of Exceptions contesting the ALJ's finding that Pearson was entitled to \$9590.59 in backpay for her and her daughter's expenses. In Respondent's Exception 15, it contends that there is no evidence in the record to support a finding of Pearson's daughter's disability. Similarly, in Respondent's Exception 16, Respondent suggests that there is

no legal basis for the ALJ's finding that Pearson's daughter was disabled. In Respondent's Exception 17 Respondent contends that there is no evidence of payment of Pearson's daughter's medical care or for prescription drugs for her daughter. In Respondent's Exception 18, Respondent contends that the ALJ erred in admitting prescription drug summaries of Pearson and her daughter. In Respondent's Exceptions 19 and 20, it contends that the ALJ erred in disregarding evidence of payment by an alleged Worker's compensation settlement and a mold settlement, respectively, during the relevant period.

With respect to Respondent's Exceptions 15 and 16, the ALJ correctly determined that Pearson's daughter was disabled. Pearson testified that her daughter was born in 1986 and has been diagnosed by her physicians with epilepsy, fibromyalgia, pain, muscle spasms, an overactive bladder and allergies. (Tr. 130:25, Tr. 81:5-6). Typically a dependent child would no longer be eligible for coverage over the age of 19 under the Trust Fund plan. (Tr. 168:21- 23.) However, according to the Trust Fund Summary Plan Document, if a child is disabled the plan does not specify an age limit. (Tr. 169:4- 6.) Board Agent Pierce made her calculations based on the fact that Lynne Pearson's daughter was disabled. (Tr. 169:11- 13.) Additionally, Ms. Pearson testified that the Social Security Administrative Agency has determined that her daughter was disabled. (Tr. 85:13- 86:5.) Her daughter also receives monthly benefits from the Social Security Administration. (Tr. 86:2- 6.) Ms. Pearson was unclear as to when exactly her daughter began to receive social security benefits (Tr. 86:10- 12.) She believes it was around when her daughter was 22. (Tr. 90:22- 91:1.) According to Ms. Pearson, the Social Security Administration found her daughter to be disabled on the basis of epilepsy and fibromyalgia. (Tr. 86:13- 14.)

Ms. Pearson's daughter suffers from several medical conditions including epilepsy, fibromyalgia, pain, muscle spasms, an overactive bladder, and allergies. (Tr. 81:5- 6.) Ms.

Pearson's daughter took prescription medications during the relevant backpay period. (Tr. 86:20-22.) Additionally, Ms. Pearson paid for numerous medical expenses on behalf of her daughter during the liability period. (Tr. 95:19- 22.) These included medical expenses as listed on Blue Cross Blue Shield Explanations of Benefits where Ms. Pearson paid the deductible and co-payment amounts. (Tr. 95:19- 22.) Similarly, Ms. Pearson paid the co-payment amounts listed on CVS Pharmacy Summary of Prescription Documents, on behalf of her daughter, during the liability period. (Tr. 96:17- 19, Tr. 98:18- 20.) She also paid the co-payment amounts listed on a Costco Pharmacy Statement, on behalf of her daughter, during the liability period. (Tr. 99:17- 20.)

However, according to the Trust Fund summary plan document, if a child is disabled the plan is not limited by age. In view of the child's impairments and the Social Security Administration's finding of disability in 2006, the ALJ reasonably concluded that Pearson's daughter was disabled.

Contrary to Respondent's contentions Counsel for the Acting General Counsel is not obligated to present medical expert testimony or medical documents to prove Pearson's daughter was disabled. Because it is often impossible to calculate the exact amount of backpay owed to each employee, General Counsel's burden of proof is met by employing a formula designed to produce a reasonable approximation of what is owed. *Reliable Electric Company*, 330 NLRB 714, 723 (2000)(citing *Intermountain Rural Electric Assn.*, 317 NLRB 588, 591 (1995)) (emphasis added). Therefore, General Counsel is obligated only to base its calculations on a formula that will provide a reasonable summary of what is owed.

Next, with respect to Respondent's exceptions 17 and 18, the ALJ did not err in admitting prescription drug summaries reflecting payments incurred by Pearson and her daughter. Respondent contends that the summaries were not authenticated, were hearsay evidence and the accuracy of the information was not verified. (REB 25). However, despite Respondent's contention that documents were not exceptions to the hearsay rule the ALJ found that documents appear to be documents kept by both the pharmacies and medical provider in the regular course of business. (ALJD at 12.) The ALJ credited Pearson's testimony that she obtained these records from her pharmacies and medical provider. *Id.* Additionally, the ALJ reasoned that after nine years Respondent should not be able to profit from the absence of Pearson's original bills and preclude Pearson's recovery of out-of-pocket medical costs caused by Respondent's wrongdoing. *Id.*

Lastly in Respondent's Exceptions 19 and 20, Respondent argues that the ALJ erred in disregarding evidence of payment of an alleged Workers Compensation settlement and an alleged private mold settlement. (REB 23-24). However, Respondent's contentions are simply false. The ALJ did not disregard the evidence. Rather, the record does not reflect any award in any Worker's Compensation claim for prescription drugs. Similarly, the record does not reflect any documentary evidence of a settlement of a private mold lawsuit providing for prescription payments to Pearson or her daughter. (Tr. 123:15- 21.) Respondent made references to such awards put provided no probative evidence that either claim contributed towards Pearson's medical expenses.

Thus, the ALJ properly concluded that Lynne Pearson is entitled to \$9590.59 in backpay for expenses incurred during the liability period. Accordingly Respondent's Exceptions 15, 16, 17, 18, 19 and 20 should be denied.

H. Exceptions to the ALJ's Decision to Grant the Unite HERE Health Petition to Revoke Respondent's Subpoena Duces Tecum and the ALJ's Decision to Partially Grant Unite HERE Local 11, International Union's Petition to Revoke Respondent's Subpoena Duces Tecum (Exceptions 21 and 22)

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN BRIEF
21- The ALJ erred in granting Unite HERE Health's Petition to Revoke Respondent's Subpoena Duces Tecum. 22- The ALJ erred in partially granting Unite HERE Local 11, International Union's Petition to Revoke Respondent's Subpoena Duces Tecum.	17-18

Prior to the opening of the Hearing the ALJ found Requests 1, 2, 3, and 4 in Respondent's subpoena to the Trust Fund to be not relevant. (Tr. 30:8- 9). The ALJ also found that Requests 5, 6, 7, 8, and 9 were not relevant. (Tr. 31:11- 12, 33:9-10, 35:8-9). The ALJ found that in Request 10, Respondent was asking for internal Board Documents. (Tr. 35:9- 10). The Judge also found that Request 11 and 12 to be irrelevant. (Tr. 39:14-15, 39:17). The parties reached a stipulation with respect to Request 13 that none of the employees were covered by the Trust Fund during the period of May 1, 2003 to the present.

Similarly, the ALJ found that the majority of Respondent's requests in the subpoena to the Union were irrelevant and noted that many of the requests were identical to those made to the Trust Fund. The ALJ determined that there were no such records with respect to requests 1, 2, 3,

and 4. (Tr. 42:13-17). The ALJ determined that requests 5 and 6 were moot. (Tr. 42:18-22). For the requests, requests 7 through 18, the Union provided documents responsive to the requests that occurred outside the time period litigated in the underlying ULP hearing. (Tr. 44:10-13). For requests 19 through 25, the ALJ determined that there were no responsive documents. (Tr. 46:24-Tr. 47:1)

In Exceptions 21 and 22, Respondent contends that ALJ's decision granting Unite Here Health and Unite Here Local 11's Petition to Revoke Respondent's Subpoena Duces Tecum was contrary to the May 31, 2009 Ninth Circuit court decision that Respondent be allowed to present evidence of whether its predecessor had changed the CBA or reached impasse, or whether Respondent would have, after bargaining in good faith, reached an agreement with the Union or bargained to an impasse. Once again, the ALJ is not bound by the Ninth Circuit. Additionally, Respondent fails to substantiate why the ALJ erred in granting both petitions to revoke.

In Respondent's Brief Supporting Exceptions, Respondent failed to detail why the requests were relevant. Rather, Respondent simply contended that that it was contrary to the Court's May 31, 2009 court decision that the Respondent be allowed to present evidence of whether its predecessor had changed the CBA, or reached an impasse or whether Respondent would have after bargaining in good faith reached an agreement with the Union or bargaining to impasse. (REB at 18-19). However, absent these bare assertions Respondent did not explain why the requests were relevant.

Nowhere in its brief does Respondent explain its theory to why the ALJ's decisions, on either subpoena, prohibited Respondent from presenting evidence of whether its predecessor had changed the CBA, or reached impasse, or whether Respondent would have bargained in good faith to reach an agreement with the Union, or bargained to an impasse. Accordingly, these bare

Exceptions should be disregarded for failing to comply with the Board's Rules and Regulations.

Sunshine Piping, Inc., 351 NLRB 1371, n.1 (2007).

Thus, Respondent's Exceptions 21 and 22 should be denied.

I. Exception to the ALJ's Failure to Rule on Respondent's Motion to Introduce Evidence of JLL Inc. Modification of CBA with HERE, Local 11 was an Abuse of Discretion Which Resulted in the Exclusion of All Evidence Concerning Changes in the CBA Between the Parties (Exception 23)

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN BRIEF
23- The ALJ failure to rule on Respondent's Motion to Introduce Evidence of JLL., Inc. Modification of CBA with HERE, Local 11 was an abuse of discretion which resulted in the exclusion of all evidence concerning changes in the CBA between the parties.	18-19

During the Compliance hearing the ALJ summarily denied Respondent's request that he decide a motion to dismiss portions of the NLRB's second amended complaint specification. (Tr. 196: 25-25). However the ALJ noted that the he would not consider anything until he had an opportunity to view briefs and see the record. *Id.* The ALJ assured Respondent that it would have an opportunity to renew the motion its post-hearing brief. *Id.*

In Respondent's Exception 23, Respondent argues that the ALJ's failure to rule on a modification of the collective bargaining agreement by Respondent's predecessor was an abuse of discretion which resulted in the exclusion of all evidence concerning changes in the CBA between the parties.

To the extent that Respondent argues that collective bargaining agreement provisions regarding healthcare benefits had already been changed by its predecessor, JLL, Respondent is precluded from doing so. Issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. *Paolicelli*, 335 NLRB 881, 883 (2001). In *JLL Restaurant, Inc. d/b/a Smoke House Restaurant*, 347 NLRB 192 (2006) the Board found that the Respondent unlawfully failed to apply the terms of the collective bargaining agreement between JLL and the Union unilaterally changed terms and conditions of employment. (G.C. Exh. 1(a).) Therefore, because the Board determined that a unilateral change occurred, prior to impasse, Respondent's assertion that JLL changed the collective bargaining provisions regarding healthcare prior to May 1, 2003 is immaterial as the issue has already been litigated and decided.

Accordingly, Respondent's Exception 23 should be denied.

J. Exception to the ALJ's Failure to Allow Respondent to Introduce Physical and Testimonial of the Financial Health of Respondent from May 2003 to October 2003 as Evidence of What Respondent Could Realistically Afford in Terms of a New CBA (Exception 24).

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN BRIEF
24- The ALJ abused his discretion when he failed to allow Respondent to introduce physical and testimonial evidence of the financial health of Respondent from May 2003 to October 2003, as evidence of what Respondent could realistically afford in terms of a new CBA.	19

The ALJ acknowledged that Respondent raised an affirmative defense that to require Respondent to pay approximately \$1,663,916.81 in back payments to the Trust Fund would be unnecessarily harsh, punitive, and unfair to Respondent, and create an undue hardship forcing the restaurant to close, and declare bankruptcy. (ALJD at 12). However, the ALJ noted that this was not an issue that he could resolve because in a compliance proceeding, the judge simply quantifies the respondent's existing burden. *Id.*

In Respondent's Exception 24, it contends that the ALJ denied the Respondent the opportunity to present evidence of the financial status of Smoke House Restaurant during the relevant period so negotiations with the Union for a new CBA. (REB at 19).

However, there is no evidence that good faith negotiations ever occurred. Here, Respondent has presented insufficient evidence to meet such a burden. First, Respondent failed to demonstrate that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement. Respondent presented evidence that in 2003 Mr. Spencer told Union representatives that they could not take on the obligation of starting the insurance plan until they knew what their financial status was. (Tr. 259:13- 15.) Mr. Spencer added that he did not feel comfortable signing a long term contract with the Union, even a two-year contract, because the business was on "quicksand." (Tr. 259:20- 22.) However, Respondent failed to produce any documentary evidence in support of their inability to pay. Additionally, Respondent presented insufficient evidence of any meaningful bargaining after May 1, 2003 which would have potentially in turn provided an indication of what the Respondent would have agreed to. Similarly, Respondent introduced no evidence to support a finding of a date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated.

Respondent also contends that the ALJ erred in rejecting a profit and loss statement that purportedly showed Respondent's financial status. (REB 19). In Respondent's Brief in support of Exceptions, they refer to Exhibits PP and MM. Exhibit PP is a letter that Respondent reflecting their position on the sent to Travis Williams However, this document was rejected by the Judge because it was a self serving letter conveying the Respondent's position rather than evidence. (Tr. 283:19-21). Additionally, Exhibit MM, was a profit and loss statement from May 1 through October 31, 2003. This document, even if admitted is hardly sufficient to determine Respondent's financial status throughout the back pay period. Additionally, Respondent did not establish that it claimed hardship or poverty at any time during the negotiation process. (Tr. 248:11- 14.)

The Board has found that a respondent's inability to pay does not constitute a defense to the determination of backpay liability. *Star Grocery Co.*, 245 NLRB 196, 197 (1970); *Coal Rush Mining Inc.*, 341 NLRB 32, 33 fn. 2 (2004). The allegation that Respondent has insufficient assets to satisfy the claims made in the specification is irrelevant to a compliance proceeding. The issue in a compliance proceeding is the amount due, not whether the Respondents are able to pay. *Pallazola*, 312 NLRB 569, 570 (1993) citing *Scotch & Sirloin Restaurant*, 287 NLRB 1318, 1320 (1988). Therefore, any evidence Respondent presented in support of this argument is irrelevant. However, even if this argument was proper, Respondent did not present sufficient evidence to support its claim.

Thus, Respondent's Exception 24 should be denied.

IV. CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel respectfully submits that all of Respondent's Exceptions should be denied.

Dated at Los Angeles, California, this 23th day of April, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nicole Pereira", written over a horizontal line.

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Re: SMOKE HOUSE RESTAURANT, INC.
Cases: 31-CA-26240, 31-CA-26418, 31-CA-26285

CERTIFICATE OF SERVICE

I hereby certify that I served the attached copy of the **COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the parties listed below on the 23rd day of April, 2013.

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